IN RE UPPER FLORAS TIMBER SALE ET AL.

IBLA 85-40 Decided May 13, 1985

Appeal from a decision of the Medford District Office, Bureau of Land Management, rejecting in substantial part a protest of timber sales. 5409 (110.31)

Affirmed in part; set aside in part and remanded.

1. National Environmental Policy Act of 1969: Environmental Statements--Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales

> Where, subsequent to the issuance of a final programmatic EIS detailing a specific level of clearcutting activities, it is determined to substantially increase the amount of acreage to be clearcut, far beyond any level reasonably foreseeable by a review of the EIS, BLM must either issue a new EIS or a supplemental EIS prior to implementing the increased level of clearcutting.

2. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals

> A party seeking to establish that BLM has violated applicable policies regarding clearcutting on Federal leases has the burden of showing error in BLM's actions. A mere disagreement or difference of opinion will not establish such error.

3. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals

> Sec. 1 of the Act of Aug. 28, 1937, 43 U.S.C. § 1181a-1181f (1982), requires that revested Oregon and California Railroad lands classified as timberlands shall be managed (with one exception) for permanent forest production and that the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds,

> regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.

4. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales -- Timber Sales and Disposals

> Authority for BLM's clearcut harvest of low intensity lands, whose timber forms no part of allowable cut, is found in sec. 307(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737(a) (1982), wherein the Secretary is authorized to conduct investigations, studies, and experiments on his own initiative or in cooperation with others involving the management, protection, development, acquisition, and conveying of public lands.

APPEARANCES: Paula Downing, president, Headwaters, Inc., Grants Pass, Oregon; James Clason, Associate District Manager, Medford, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Headwaters, Inc. (Headwaters), has appealed from a decision of the Medford District Office, Bureau of Land Management (BLM), dated August 29, 1984, rejecting, in substantial part, a protest against five timber sales advertised by BLM and numerous other sales for which no advertisement had been published. Appellant's protest against this latter group of unadvertised sales was rejected as untimely because BLM held that its announcement of such sales in a timber sale plan did not constitute a protestable decision. In its statement of reasons, appellant does not address any of these unadvertised sales and, accordingly, it has failed to meet its burden of showing error in BLM's decision. This decision, insofar as it rejects Headwaters' protest against unadvertised sales, is affirmed.

The five advertised timber sales on appeal are the Birdseye West (84-10), Cinnabar West (84-11), Upper Floras (84-14), Thin Horse (84-31), and Hewitt Test (Misc. GP-8). All lands within the Cinnabar West and Upper Floras sales are within the Jackson and Klamath Sustained Yield Units (JKSYU); All lands within the Thin Horse and Hewitt Test sales are within the Josephine Sustained Yield Unit (JSYU); the Birdseye West sale area is partly within the JKSYU and partly within the JSYU. While certain acreage is to be harvested for overstory removal or mortality salvage, the vast majority is scheduled to be clearcut.

Prior to BLM's advertising of the five sales on appeal, it issued in October 1978 a Final Timber Management Environmental Statement for the Josephine Sustained Yield Unit (JFES) analyzing its 10-year timber management plan for the 425,720 acres of public land in that unit. Thereafter, in November 1979, it issued a Final Timber Management Environmental Statement for the Jackson and Klamath Sustained Yield Units (JKFES). This document examined BLM's 10-year timber management plan for the 488,258 acres of public land in these two units.

[1] Appellant presents a host of charges in its statement of reasons, the first set of which is that BLM's proposed sales violate the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1982), the so-called Church guidelines on clearcutting, the Act of August 28, 1937 (O & C Act), 43 U.S.C. § 1181a-1181f (1982), and the aforementioned JFES and JKFES. NEPA is violated, appellant contends, because, since fiscal year (FY) 1979, BLM has offered for sale more than 25,000 acres to be harvested by clearcut. Such an amount, appellant charges, exceeds by nearly 16,000 acres the projected clearcut acreage to be offered throughout BLM's 10-year timber plan. Appellant maintains that the consequences of clearcutting this excess acreage have not been assessed by the existing environmental impact statements (EIS's) or environmental assessments (EA's).

We note that Table 1-1 in both the JFES and JKFES projects a clearcut harvest of 5,000 acres and 4,000 acres, respectively, during the 10-year period of BLM's timber management plan. In response to appellant's charges, BLM states that the Medford District has prepared a draft supplement to the JFES and JKFES in order to address the public controversy that has developed "due to perceived differences between existing timber harvest practices and those analyzed in the [JKFES and JFES]." 1/ Among the subjects discussed in the supplement is the impact of a proposed increase in the amount of clearcut acreage with an associated decrease in shelterwood harvest. 2/ Therein at page 4A, the total clearcut acreage in the JSYU is projected to be 33,800 acres and in the JKSYU 21,500 acres.

In In re Bald Point Timber Sale, supra at 311, this Board stated that if a proposed action is significantly altered after publication of a final EIS, the consequences of the new action must be formally addressed. Cited in support of this statement was 40 CFR 1502.9(c) which provides in part:

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

1/ Draft Supplement to the JFES and JKFES (October 1984) at 1.

2/ The draft supplement also examines a proposed shift in the amount of basal area removed by the first entry of a shelterwood harvest system. The present JFES and JKFES contemplate removal of a maximum of 60 percent of the original stand basal area, i.e., 12 to 16 trees left per Acre (JFES at 1-24; JKFES at 1-28). "Basal area" means "the area of the cross section at breast height of a single tree or of all the trees in a stand, usually expressed in square feet" (JKFES at G-2). Headwaters contends that the five sales at issue include shelterwood harvests that call for removal of basal area in excess of that amount (60 percent) contemplated by the JFES and JKFES, contrary to NEPA. Because BLM has decided to study this issue in its supplement to the JFES and JKFES, no further discussion of this issue is necessary. See also In re Bald Point Timber Sale, 80 IBLA 304, 310 (1984).

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

In Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981), the court examined whether various design changes in the Tennessee-Tombigbee Waterway, made after the initial EIS, necessitated the filing of a supplemental EIS. In concluding that, under the facts of that case, a supplemental EIS was required, the court declared that "NEPA does require the supplementation of an EIS when subsequent project changes can, in qualitative or quantitative terms, be classified as 'major Federal actions significantly affecting the quality of the human environment.'" Id. at 991.

Thus, the ultimate question is whether an increase of the acreage to be clearcut in excess of 500 percent for the 10-year period covered by the EIS is a change sufficiently substantial in quantitative or qualitative terms so as to necessitate the preparation of a supplemental EIS. We think it clear the answer is in the affirmative.

Initially, we note that all EIS's are essentially guidelines and that, as such, minor variations could be expected whenever a program is being implemented. But, as the variance between the proposed plan and the actual program increases in magnitude, a point must be reached where the plan being implemented can no longer be fairly said to encompass the same plan described in the EIS. When this situation develops, it is incumbent upon the decisionmakers either to prepare an entirely new EIS which adequately describes the plan actually being implemented or, alternatively, to issue a supplemental EIS which addresses those elements of the original program which have changed since promulgation of the EIS.

The increase in the acreage designated for clearcutting in the instant case is far too great for us to treat it as merely a fine-tuning adjustment to the program envisaged by the original EIS's. Rather, the past rate of clearcutting, as well as BLM's future intent as evidenced in the draft supplemental EIS, establishes that BLM seeks to substantially modify its original 10-year program adopted for the Josephine and Jackson-Klamath SYU's. Thus, preparation of a supplemental EIS accurately reflecting the harvesting program which BLM has, in essence, already implemented is not so much an election on the part of BLM to further the purposes of NEPA as a mandatory requirement imposed on BLM should it desire to continue clearcutting at its present rate within these units. See generally, National Indian Youth Council v. Watt, 664 F.2d 220, 224-25 (10th Cir. 1981).

We recognize, of course, that a draft supplemental EIS has been prepared and that issuance of a final supplemental EIS may be imminent. But we

cannot conclude from its mere existence in draft form that the final supplemental EIS will merely duplicate the conclusions tentatively forwarded in draft. Indeed, while all EIS's are prepared in the light of a specific proposal for action (or inaction), the premise of the entire environmental analysis is that data may be developed which will convince the decisionmaker to discard or modify his initial approach in favor of an alternative approach which minimizes adverse environmental impacts disclosed during the analysis. Unless the decisionmaker remains open to such a possibility, the preparation of the EIS becomes but a hollow mockery of its real purpose. We cannot, as a matter of law, presume that the course of action outlined in the draft supplemental EIS will be the action which ultimately commends itself to the authorized officer upon a review of all of the evidence. Accordingly, we must set aside the instant sales, except for the Hewitt test sale discussed below, and remand them to the State Office for further consideration as to their conformity to the final supplemental EIS when that document is ultimately adopted.

The Hewitt Test sale is a 20-acre progeny site that was selected to aid in the development of high quality conifer seed for reestablishment of harvested areas. Located at an elevation between 1,600 feet and 2,200 feet, the site satisfies BLM's need for test locales at different elevational zones. BLM points out that the Hewitt Test site is one of 10 sites in the Marial-1 breeding zone. If the data from these high intensity lands is to be included in a valid statistical evaluation, it is essential that logging and site preparation be completed during the summer of 1985. In this way, seedlings that were scheduled to be planted in the spring of 1985 can be held in a nursery for an extra year and be planted by the spring of 1986.

As we noted above, relying on Environmental Defense Fund v. Marsh, supra, the key test in determining whether a supplemental EIS need be prepared, owing to changes in the proposal originally adopted, is dependent upon ascertaining whether those changes either quantitatively or qualitatively could be said to constitute "major Federal actions significantly affecting the quality of the human environment." We have already discussed the dramatic revisions which have been made in the total acreage designated for clearcutting. This increased emphasis on clearcutting as a major mode of timber harvesting was clearly not within the contemplation of the decisionmakers who adopted the original 10-year programs for the Josephine and Jackson-Klamath SYU's. While such a policy choice might well be acceptable, we have noted that it requires supplementation of the EIS prior to implementing such a change. The question before us now is whether the same result should obtain with respect to the test sites in these units, particularly the Hewitt Test sale which is part of the instant appeal.

It is clear that both BLM and appellant have consistently treated the test progeny sites as independent of the timber management program as described in the two EIS's. Thus, a totally discrete programmatic environmental analysis was prepared in 1979, solely limited to the progeny planting sites. The progeny program was carefully delineated and it was concluded that the program would not have a significant effect on the quality of the

human environment and that, therefore, no EIS was needed. As written, the programmatic EAR clearly contemplated the likelihood that clearcutting on such progeny sites would be necessary in order to prepare a uniform planting for each site, as is, indeed, planned for the Hewitt Test site. Thus, the problems generated by the dramatic increase in clearcutting under the timber management program do not undermine the continued efficacy of progeny planting program. In fact, the progeny planting program is continuing on the original path upon which it was set. There is, therefore, no basis in the record to interfere with the ongoing progeny testing program. Accordingly, we expressly affirm denial of the protest as it relates to this sale.

In addition to its charges that the dramatic increase in clearcutting violated NEPA guidelines, appellant also argues, at some length, that BLM has violated the so-called Church guidelines on clearcutting. 3/ We will briefly address this allegation.

The Church guidelines are contained in a 1972 report entitled "Clearcutting on Federal Timberlands," prepared by the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, then under the chairmanship of Senator Frank Church of Idaho. Various oversight hearings had been held in 1971 for the purpose of determining whether or not clearcutting resulted in intolerable impacts on the Federal land. While numerous abuses were highlighted during these hearings, a number of industry and professional representatives strongly defended the use of clearcutting techniques in the proper circumstances. In view of the disparate points of view advanced, and expressly recognizing that clearcutting did have a significant role to play in timber management, the Subcommittee deemed it appropriate "to suggest guidelines for the conduct of timber harvesting activity on the Federal lands which will assure that the problem areas are eliminated while important national needs for timber are being met." Id. at 8. The guidelines which they suggested, some of which we set forth below, have since been referred to as the Church guidelines.

It is important at the outset to keep clearly in mind the fact that the Church guidelines are precisely what the Subcommittee called them, namely, "policy guidelines." Id. at 9. Indeed, the Subcommittee on Public Lands expressly eschewed any attempt to "legislate professional forestry practices in public land management any more than it does engineering practices for the Bureau of Reclamation or medical practices for the Veterans Administration." Id. at 2. Rather, the Subcommittee proposed certain considerations which it deemed relevant in determining when clearcutting might be an appropriate harvesting technique. Thus, it suggested:

3/ The Church guidelines appear in an unnumbered report by the Subcommittee on Public Lands to the Committee on Interior and Insular Affairs, U.S. Senate, 92d Cong., 2d Sess., Mar. 1972.

2. Harvesting limitations

Clear-cutting should not be used as a cutting method on Federal land areas where:

a. Soil, slope or other watershed conditions are fragile and subject to major injury.

b. there is no assurance that the area can be adequately restocked within five years after harvest;

c. Aesthetic values outweigh other considerations.

d. The method is preferred only because it will give the greatest dollar return or the greatest unit output.

3. Clear-cutting should be used only where:

a. It is determined to be silviculturally essential to accomplish the relevant forest management objectives.

b. The size of clear-cut blocks, patches or strips are kept at the minimum necessary to accomplish silvicultural and other multiple-use forest management objectives.

c. A multidisciplinary review has first been made of the potential environmental, biological, aesthetic, engineering and economic impacts of each sale area.

d. clear-cut blocks, patches or strips are, in all cases, shaped and blended as much as possible with the natural terrain. [Italics in original.]

It is clear that the Church guidelines are, in many ways, merely reflections of a common-sense approach to forestry practices. Appellant, however, suggests that BLM has, in numerous ways, violated these guidelines. We will examine some of these allegations. But we wish to emphasize that here, as with any guideline, BLM is afforded a considerable area of discretion within which to exercise its expertise and it cannot be straight-jacketed into some mindless, mechanical set of rules totally bereft of flexibility. The guidelines are not, in other words, equivalent to regulations which BLM must follow.

Addressing guideline 2b above, appellant contends that BLM reforestation records indicate that BLM has not been able to establish a stand of trees on a large part of its high intensity lands within the required 5-year period. No citation to the BLM records to which appellant refers is provided, nor does appellant allege that the lands described by such records are comparable to those of the five sales on appeal.

As this Board pointed out in In re Lick Gulch Timber Sale, 72 IBLA 261, 285 (1983), the "restocking" of an area is not synonymous with the "establishment" of a stand thereon. A stand of timber is said to be "established" if

it consists of suitable growing trees, having survived at least one growing season, and "which are past the time when considerable juvenile mortality occurs." 4/ See In re Chapman-Keeler Timber Sale, 80 IBLA 237, 242-43 (1984). "Stocking" is an expression of the number of uniformly spaced, suitable trees per acre. Assuming arguendo, that BLM has not been able to establish a stand of trees in a particular area within the required 5-year period, it does not follow that the area was not adequately restocked. No violation of guideline 2b is demonstrated by appellant, even assuming the truth of its factual allegation.

In its JFES, BLM states that approximately 26 percent of the high intensity lands in the JSYU possess soil and topographic and climatic conditions suitable for clear-cut harvest techniques. Regeneration can be accomplished, BLM notes, within 5 years of harvest with standard artificial reforestation methods. 5/ For the JKSYU, BLM states that approximately 16 percent of the high intensity lands in the JKSYU possess these same qualities. 6/ Church guideline 2a states that clearcutting should not be used where soil, slope, or other watershed conditions are fragile and subject to major injury. Appellant charges that guideline 2a is violated by BLM's method of clearcutting, yarding, and burning in the Birdseye
West, Upper Floras Creek, and Cinnabar West sales, arguing particularly that the soils in the Birdseye West are all very fragile, 7/ and are classified as having erosion, mass failure, or regeneration problems. Appellant further maintains that information in the Upper Floras EA indicates that the entire area of this unit has reforestation problems due to temperature, moisture, and animals. In addition, appellant points to reforestation problems, caused by moisture or temperature, in every acre of the Cinnabar West unit and claims that the broadcast burning proposed there will promote excessive erosion and reduce site productivity, contrary to the management framework plan (MFP). Headwaters notes that alternate harvesting, road building, and burning practices are recommended in the MFP.

In response, BLM acknowledges that the soil in approximately 80 of the 326 acres in Birdseye West is classified as fragile, having been formed from granitic parent material (Siskiyou (721) and Holland (722) soil series). It maintains, however, that the hazard of any significant impacts to the soil resource will be greatly reduced because no new road construction is planned on the granitic soils. In the EA and contract, BLM points out, are special

4/ BLM Manual 5705.05H, Oregon State Office Supplement.
5/ JFES at 1-5.
6/ JKSYU at 1-8.
7/ Appendix C to the JKFES sets forth BLM's Timber Production Capability Classification (TPCC) system. Therein at C-1, "fragile areas" are defined as "[p]roblem sites whose timber growing potential is easily reduced or destroyed; e.g., loss of timber growing potential may result from soil erosion or mass wasting." These sites may be restricted if special techniques are available to protect the site from damage due to road construction, logging activities, etc. If such special techniques are not available, the site is withdrawn from the timber production base. Id.
The soils found in the Birdseye West unit are the Beckman (718), Siskiyou (721), Holland (722), and the Colestine (781).

unit considerations 8/ and project design features 9/ that deal with the impacts of operating on fragile soils. Practices which would cause unacceptable impacts have been eliminated from the contract, BLM contends, and other impacts have been satisfactorily mitigated.

With respect to the Upper Floras unit, BLM notes that the impacts and mitigating measures relating to soils are adequately addressed in the EA and reflected in the timber sale contract. Our review of the EA reveals that BLM intends to require the following "project design features" affecting soils: tractor-type logging equipment may not be used when soil moisture exceeds 25 percent by weight at a 6-inch depth, 10/ all primary roads are to be waterbarred shortly after yarding to reduce the erosion potential; 11/ all tractor units would be cable yarded; 12/ and an alternative form of site preparation from machine piling and scarification would be used. 13/

8/ On Sept. 16, 1983, the Area Manager accepted the draft EA, dated Apr. 15, 1983, as the final EA for the Birdseye West unit (OR-110-83-117). Special unit consideration I.A.1.e(2) of the EA states:

"(2) Portions of unit 5-1 are highly unstable because of the granite parent material and the steepness of the slopes. Road 37-4-5.0 should not be extended to facilitate yarding of unit 5-1 because of a steep headwall it would have to cross. A 2-3 acre portion of unit 5-1 would be examined to determine if multi-span would allow cable yarding. If this portion cannot be cable yarded it would be removed from the proposed action. A minimum of 100 feet no harvest buffer should be implemented along the two class 4 streams in unit 5-1 due to highly unstable soils."

9/ Project design feature I.C.2.f and I.C.3 of the EA state:

f) Season of Road Use and Logging

"Season of road use and logging would be limited to April 15 to November 1 on the following soils:

"721 Siskiyou

"722 Holland

* * * * * * *

"3. Site Preparation and Fuels Management

"a) Minimize Loss in Soil Productivity and Surface Erosion

"(1) Burning

"Burning would be done in the following soil series only when a cool burn (less than 500 Byram's Intensity) could be accomplished to prevent loss of organic matter and nutrients and subsequent loss in site productivity. A soil scientist would review all burning plans on these soils.

"(701) Series

"(721) Siskiyou Series

"(722) Holland Series"

10/ See section I.G.2.a of the draft EA for the Upper Floras unit, April 1983.

11/ Id. at section I.G.2.b.

12/ Id. at section III.C.2.a(2).

13/ Id. at section III.C.2.a(3).

BLM's response to Headwaters' statements regarding the Cinnabar West unit is similar, i.e., that project design features, special unit considerations, and mitigating measures in the EA and contract have been designed to mitigate the impacts of timber harvest, site preparation, and road construction. These various provisions are set forth in the draft EA at sections I.A., I.B., III.D., and in the decision record of June 14, 1984, at item 7, BLM notes. Moreover, BLM points out that a recent study by the Southwest Oregon Forestry Intensified Research Program (FIR) concludes with respect to slash burning that prescribed burns of low to moderate intensity should not increase the potential for erosion in the lower rainfall zones of southwest Oregon. 14/ BLM further cautions that the recommended watershed practices of the MFP are acknowledged in the JKFES to be "guidelines only" and should be used in conjunction with onsite investigations. 15/

[2] In challenging policies of BLM in managing the Federal lands, any party bears the burden of showing error in its actions. A mere disagreement or difference of opinion will not suffice in this respect. Robert C. Salisbury, 79 IBLA 370, 379 (1984). Moreover, appellant must do more than simply level broadsides charges at BLM; the error alleged must be stated with reasonable particularity and supported by objective proof. We discern no violation of Church guideline 2a on the Birdseye West unit because appellant has not shown that BLM's special unit considerations and project design features will fail to check the major limitations of fragile soils. Although some soils in the Birdseye West may be regarded as fragile, appellant has failed to demonstrate that they remain "subject to major injury" if BLM's special unit considerations and project design features are employed, as we assumed they will be, should the sale comport with the final supplemental EIS.

With respect to the Upper Floras and Cinnabar West units, a similar holding pertains. Assuming, arguendo, that the soils in these units, specifically, the Geppert (740), Freezner (741), Beckman (718), Colestine (781), Siskiyou (721), and the unnamed 701, 776, and 777, are fragile soils within the meaning of the Church guidelines, 16/ appellant has not demonstrated that these units are subject to major injury, given BLM's intention to mitigate the impacts of its clearcut. In the Cinnabar West unit, for example, BLM intends to conduct only cool burns on soils that are shallow and rocky or of granitic parent material. 17/ Such measure would improve the potential for plantation success by reducing competition for moisture 18/ without contributing to a breakdown in surface soil structure. 19/ Appellant's charge that the

14/ Response to statement of reasons at 3, quoting from the FIR report, Volume 5, No. 4, attachment 1.
15/ Appendix D, at D-1, JKFES.
16/ No definition of the term "fragile" is provided by appellant, nor does it suggest that the term was defined as part of the Church guidelines. See note 7, supra, for a definition of "fragile areas" according to the TPCC. 17/ Draft EA for the Cinnabar West unit at I.A.1.d.
18/ JKFES at 1-31.
19/ Id. at 3-7, 8.

MFP recommendations are contrary to BLM's proposed action lacks sufficient detail and support to establish error in BLM's acts.

Appellant next charges that BLM violated the guideline which states that clearcutting should not be used where aesthetic values outweigh other considerations. While recognizing BLM argued that its Visual Resource Management (VRM) guidelines found the sales to be aesthetically acceptable, appellant suggests that while they may be suitable for the casual visitor to an area, they fail to measure the effects clearcutting will have on people who live within the "viewshed" of a timber sale and for whom the daily exposure is not acceptable. Proper visual resource management requires consideration of the cumulative visual impacts of clearcutting, Headwaters maintains. In addition, appellant contends that, in fact, BLM is exceeding the VRM contrast rating in many clearcuts.

On this point, appellant does little more than express its disagreement with the aesthetic values incorporated in BLM's VRM guidelines. Indeed, appellant acknowledges that a casual visitor might not object to such impacts, though appellant doubtless does. Such disagreement falls far sort of establishing that BLM's actions are clearly erroneous or contrary to the established policies. Robert C. Salisbury, supra at 379.

Appellant's charge that BLM failed to consider the cumulative visual impacts of clearcutting and violated its own VRM guidelines lacks sufficient detail to permit this Board to determine if the charge is accurate. In what unit did BLM exceed its VRM guidelines? What basis does appellant have for concluding that cumulative visual impacts have been overlooked? Appellant bears the burden of producing such information, but has failed to discharge its responsibility. In view of the lack of probative evidence produced by appellant, we hold that no violation of aesthetic considerations has been established.

A similar holding is applicable to the charge that guidelines 2d, 3a, and 3b have been violated. Guideline 2d, prohibiting clearcutting on Federal land where that method is chosen only because it will give the greatest dollar return or greatest unit output, has been violated, appellant maintains, because it is "obvious" that the only way that BLM can make these timber sales attractive to bidders is to offer large clearcut areas for sale. BLM designs these clearcut sales to pay for site development and road building, appellant contends.

In response to appellant's 2d argument, BLM points out that silviculture was only one element considered by its interdisciplinary team. Clearcutting was recommended as the preferred method of harvest independent of logging cost constraints, BLM contends. Moreover, BLM notes that the charge that the sales are being clearcut to fund road construction is belied by the facts. 20/

20/ BLM adds:

"Collectively, Birdseye West, Upper Floras Creek, Thin Horse, and Hewitt Test have 3.6 miles of new road construction and have a sale volume of 14.9 million board feet.

Guideline 3a states that clearcutting should be used only where it is determined to be silviculturally essential to accomplish the relevant forest management objectives. Guideline 3b requires that the size of clearcut blocks be kept to the minimum necessary to accomplish silvicultural and other multiple use forest management objectives. Appellant contends that these guidelines are violated by BLM's failure to set a standard that must be satisfied before clearcutting is justified.

BLM responds to Headwaters' charge in this way:

> District foresters and other resource specialists have determined the optimum method of harvest through extensive silvicultural prescriptions and field reviews. Although the harvest units are not all clearcuts, when that method of harvest was selected, it was done with the concurrence of all involved professionals.

As far as size of units is concerned, this is determined by the I.D. [Interdisciplinary] team during individual, on-the-ground, sale reviews. Logging systems, road construction constraints, wildlife objectives, silvicultural needs and VRM all play a role in determining the size, shape and location of each unit. They are always kept to a minimum size to meet management objectives.

We hold that BLM's response to arguments based on Church guidelines, 2a, 3a, and 3b is ample refutation of these arguments. A discussion of BLM's standards in determining whether clearcutting is advisable may be found in its Timber Management Final Environmental Impact Statement (1976) at I-53 through I-56.

Appellant's next argument is the contention that BLM's allowable cut 21/ is not sustainable and is, therefore, violative of the O & C Act, supra, and Church guideline 1b. 22/ In support thereof, Headwaters points

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fn. 20 (continued)

"Cinnabar West is the only sale with an extensive amount of new road construction. This sale has 8.2 miles of new road construction. It was developed in accordance with a sequential harvest plan which called for more road construction on the first entry in order to space unit entries geographically and allow for regrowth of the harvested units prior to removal of timber from adjacent stands." (Answer at 4).

21/ "Allowable cut" means "[t]he amount of forest products that may be harvested annually or periodically from a specified area over a stated period in accordance with the objectives of management" (JFES at page 0-1).

22/ Church guideline No. 1 states:

"1. Allowable harvest levels

"a. Allowable harvest on Federal forest lands should be reviewed and adjusted periodically to assure that the lands on which they are based are available and suitable for timber production under these guidelines.

out that herbicide use has been banned for approximately 2 years in the Medford District and contends that BLM must make adjustments in its allowable harvest for credits taken for herbicide use. In response to a similar argument posed by Headwaters in its protest, BLM stated: "The Medford District has reduced its annual allowable cut due to the inability to carry out intensive management practices during FY 1983, FY 1984 and in the FY 1985 plan." In a further response on appeal, BLM offers citations to those documents that show how it calculates allowable cut.

BLM's response to Headwaters' protest acknowledges that its allowable cut has been reduced. We, therefore, perceive no present dispute on this issue. If appellant continues to object to BLM's reduced cut level, it has failed to state its position with clarity. Appellant's inquiry into how BLM calculates its allowable cut appears to be satisfied by BLM's response on appeal.

Not included in calculations of allowable cut are certain lands whose regeneration period exceeds 5 years following a clearcut or regeneration cut. 23/ Because these lands are determined to be capable of growing in excess of 20 cubic feet of commercial coniferous species per acre per year, they are classified as "commercial forest lands" in BLM's TPCC system. These lands may be further classified as low intensity lands or limited management lands. 24/

Thirty six acres of low intensity lands in the Birdseye West sale have been offered by BLM for overstory removal. 25/ A review of the map included

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fn. 22 (continued)

"b. Increases in allowable harvests based on intensified management practices such as reforestation, thinning, tree improvement and the like should be made only upon demonstration that such practices justify increased allowable harvests, and there is assurance that such practices are satisfactorily funded for continuation to completion.

"If planned intensive measures are inadequately funded and thus cannot be accomplished on schedule, allowable harvests should be reduced accordingly."

23/ A "regeneration cut" is "[o]ne of the phases of shelterwood cutting designed to open the canopy of a stand sufficiently to allow the establishment of regeneration, i.e., either the first stage of a two-stage shelterwood cutting or the second stage of a three-stage shelterwood cutting" (JKFES at G-7).

24/ Limited management lands are commercial forest lands with limited forest management potential. These lands are characterized by shallow rocky soils, extremely droughty conditions resulting in severe regeneration problems, highly erodable soils, high water tables, and/or very steep slopes. Regeneration time, if these lands were logged, would be considerably in excess of 5 years, and successful reforestation would be uncertain (JFES at 1-6, JKFES at 1-10).

25/ Overstory removal is a final harvest cut involving the removal of a mature stand (JKFES at 0-4 (see "final harvest cut")). Table 1-1 of the JKFES and the various EA's suggest that it is the second phase of a shelterwood harvest. See also Timber Management Final Environmental Impact Statement (1976) at I-53 through I-56 describing a three-phase shelterwood harvest.

with the JKFES reveals that these lands are revested O & C lands. 26/ Headwaters contends that BLM's harvest of timber on these low intensity lands is contrary to the O & C Act, supra, and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1982), because the principle of sustained yield is violated by such action.

[3] The principle of sustained yield was first established in the Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. §§ 1181a-1181f (1982), commonly known as the O & C Act. Section 1 of the Act requires that revested Oregon and California Railroad lands classified as timberlands shall be managed (with one exception not applicable here) for permanent forest production and that the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities. Although the term "sustained yield" is not defined in the Act, Circular No. 1448, 3 FR 1796 (July 7, 1938), offered the following insight into its meaning:

> [The O & C Act] provides for the conservation of land, water, forest, and forage on a permanent basis; the prudent utilization of these resources for the purposes to which they are best adapted; and the realization of the highest current values consistent with undiminished future returns. It seeks, through the application of the policy of sustained-yield management, to provide perpetual forests which will serve as a foundation for continuing industries and permanent communities.[27/]

Headwaters states that the 36 acres of low intensity lands in the Birdseye West sale are a part of some 9,900 acres of low intensity lands which the Medford District intends to harvest on a trial basis over a 10-year period. Quoting from the JKFES, appellant points out that BLM acknowledges that its harvest of timber on low intensity lands cannot be viewed as sustainable. 28/ Headwaters contends that, because such harvest cannot be maintained in perpetuity, both FLPMA and the O & C Act are violated. Moreover, appellant argues, BLM's harvest of lands that form no part of its

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26/ For a discussion of the genesis of the O & C Act, see In re Lick Gulch Timber Sale, supra, at 264-68.

27/ Further examination of this concept appears in In re Lick Gulch Timber Sale, supra, at 267. Appellant also calls to our attention the definition of "sustained yield" appearing in FLPMA. Therein at section 103(h), 43 U.S.C. § 1702(h) (1982), this term is defined to mean "the achievement and maintenance in perpetuity of a high level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." (Emphasis supplied.) At L-2 through L-5 of the JFES, the Acting Deputy Solicitor stated that the O & C Act mandates dominant use of suitable O & C lands for commercial forestry. FLPMA's concept of multiple use, the Acting Deputy Solicitor wrote, is a broader and more flexible concept than the management directive of the O & C Act. Id. at L-5.

28/ JKFES at 1-24.

allowable cut, such as the 36 acres at issue, violates BLM Manual section 5240.06(F)(2). In addition, Headwaters charges that the impacts of harvesting low intensity lands have not been adequately analyzed in either the JKFES or the Birdseye West EA.

[4] In Cascade Holistic Economic Consultants, 60 IBLA 293, 299 (1981), several of these same arguments were addressed as follows:

> Appellants also assert that the low intensity harvest proposal is contrary to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976), and to provisions of the BLM manual. The answer is that 43 U.S.C. § 1737(a) (1976) explicitly authorizes the Secretary to conduct investigations, studies and experiments "involving the management, protection, [and] development" of the public lands. The proposal before us is precisely such an undertaking. Appellants merely voice divergent opinions; they do not show wherein the proposal is arbitrary or in any way ill-considered.
>
> Appellants' assertion that harvesting timber from low intensity land is contrary to the BLM manual is not persuasive. Appellants cite BLM manual section 5240.06(F)(2) which provides that the allowable cut level must include the volume from all planned timber harvesting practices. This provision must, however, be read in context with section 5240.06(E)(1), which states in part that "the allowable cut must relate only to forest land judged to be environmentally and economically suitable for the continuous production of timber." Appellants have not controverted the statement in BLM's answer to the effect that BLM's current policy does not include low intensity volume in allowable cut. [Footnote omitted.]

A discussion of the cumulative and site-specific impacts within the Birdseye West sale is set forth in Part III of the Birdseye West EA. Moreover, special logging provisions are set forth in the EA at Part I.A.1.c for the 36 acres at issue. Although the JKFES did not contemplate overstory removal on low intensity lands but focused rather on a regeneration cut of such lands, 29/ the harvesting of 36 acres on a trial basis does not constitute such a substantial change in the proposed action as to necessitate a supplemental EIS.

With respect to the site-specific EA's that BLM prepared for each of the five sale areas, Headwaters makes the following charges, inter alia: alternatives to the proposed action are inadequate and deficient; the EA's illegally rely on inflated estimates of mitigation effectiveness; cumulative, site-specific impacts are ignored by BLM; and the EA's fail to discuss significant impacts to all elements of the human environment.

29/ See, e.g., Table 1-1 and BLM's comments at 9-6 (comment 1-2) of the JKFES.

In focusing upon these alleged deficiencies in the EA's, appellant fails to appreciate that both the JFES and the JKFES discuss alternatives to and the cumulative impacts of BLM's proposed action. 30/ Moreover, further alternatives are discussed in the EA's. Headwaters' charge that the EA's illegally rely on inflated estimates of mitigation effectiveness lacks sufficient detail to permit review. BLM's detailed response addressing those impacts allegedly overlooked by the EA's adequately answers appellant's final contention with respect to the EA's.

Headwaters next argues that BLM's harvest of surplus inventory violates the principle of "even flow." 31/ This contention received the following response from BLM: "Amendment #1, Jackson-Klamath Timber Management Plan Record of Decision, and Amendment #1, Josephine Timber Management Plan Record of Decision, both dated December 1, 1981, eliminated the harvest of surplus inventory which decreased the allowable harvest level. The decrease in harvest levels was made specifically to maintain even flow." No reply to the above response was contained in Headwaters' subsequently filed pleading of March 5, 1985. BLM's remarks above dispose of this issue.

Headwaters' penultimate argument is the contention that BLM's Management Framework Plan (MFP) does not comply with NEPA. This plan, appellant maintains, is not the land use EIS required by NEPA 15 years ago.

No citation to NEPA, the regulations, or any authority is provided by appellant in support of its argument. In the absence of such, appellant has failed to meet its burden of showing error in BLM's decision. Moreover, BLM's response correctly points out that the purpose of the JKFES and JFES is to analyze the impacts of decisions and recommendations set forth in the MFP's.

Appellant's final charge focuses upon newly issued regulations at 43 CFR Part 5000 requiring protests of forest management decisions to be filed within 15 days of the publication of a notice of decision or sale and eliminating the automatic stay provision upon the filing of a notice of appeal. Appellant claims that 15 days is not adequate to file a statement of reasons, that insufficient notice is provided by BLM's publication of a notice of decision or sale, and that the lack of a stay provision makes a mockery of the public's opportunity to protest.

The effective date of the regulations at issue, August 13, 1984, occurred after BLM's receipt of appellant's protest but prior to appellant's filing of its notice of appeal. The files reveal, however, that BLM notified all bidders that if a notice of appeal were filed by Headwaters, delay in the award of a contract would be necessary as required by 43 CFR 4.21(a). 32/

30/ See, e.g., Chapters 3 and 8 of both the JFES and JKFES.

31/ See Cascade Holistic Economic Consultants, supra at 294, for a brief discussion of even flow.

32/ This regulation states:

"(a) Effect of decision pending appeal. Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during

Thus, it appears that appellant has not been adversely affected by these regulations. Appellant's statements, while appropriate for the comment period following proposed rulemaking, are not properly addressed to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Medford District Office is affirmed in part, set aside in part, and the case remanded for appropriate action described herein.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge.

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fn. 32 (continued)
the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, the Director or an Appeals Board may provide that a decision or any part of it shall be in full force and effect immediately."

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

Although I concur with Judge Burski's rationale, another aspect of this matter needs to be addressed.

Headwaters, Inc. has not shown how it has been adversely affected by the five advertised timber sales. Only a "party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management" may appeal to this Board. 43 CFR 4.410. In Phelps Dodge Corp., 72 IBLA 226, 228 (1983), we held as follows:

[2] Aside from the question of whether the action by BLM can be the subject of an appeal in this instance, in any case the right to appeal is limited to those who are parties to a case who are adversely affected by a decision of the Bureau of Land Management or an administrative law judge. 43 CFR 4.410. Although Phelps Dodge has filed an elaborate and extensive statement of reasons, supplemented by 50 pages of exhibits in addition to numerous maps and photographs, there is found therein neither an assertion nor even an inference that Phelps Dodge will be adversely affected by the inclusion of the subject Federal land in the study area. Although Phelps Dodge has a large mining operation in close proximity to the San Francisco Subunit, this Board has affirmed BLM's decision to exclude those Federal lands nearest the mining activity from further study, thus, in effect, leaving a buffer of Federal lands between the Phelps Dodge operation and the lands designated for further study. Phelps Dodge has asserted no right, title, claim or interest in the subject lands, nor any use of them which will be adversely affected by the action complained of. The Board will not indulge in conjecture concerning the reasons for appellant's concern. Having failed to show, or even to allege in its statement of reasons that it has been adversely affected in some cognizable fashion, Phelps Dodge Corporation must be regarded as lacking standing to appeal. Sierra Club v. Morton, 403 U.S. 727 (1972); Hal V. Carlson, Jr., 62 IBLA 305 (1982); State of Alaska, 58 IBLA 118 (1981).

The requirement of standing to appeal to this Board is not based upon our interpretation of standing to invoke the processes of the Judicial Branch under Article III of the Constitution. Rather, it is a requirement imposed by a Departmental regulation which is central to the function of this Board, and which only this Board can enforce. Moreover, it should not be administered selectively. If it applied in Phelps Dodge Corp., supra, and the numerous other cases decided by this Board on the same basis, it should apply with equal force to Headwaters, Inc. in this case.

It should not be a question of whether the Board chooses to apply the regulation; instead it is our duty to apply it. It is the obligation of the appellant to inform the Board concerning how it has been adversely affected -- if indeed it has. If it fails in that obligation, the Board must then decide whether the appeal should be dismissed summarily or whether the appellant

should be given an opportunity to establish its standing. What the Board must not do is ignore appellant's failure in this regard.

Accordingly, I would have preferred to resolve the procedural issue before addressing the merits of the case.

Edward W. Stuebing
Administrative Judge.